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No. 778

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

JOHN A. POTUCEK, Trustee of WILSON SUGAR AND ELEVATOR COMPANY, INC., Bankrupt,
Petitioner,

vs.

CORDELERIA LOURDES and CORDELERIA SANTA INES,
Respondents,

In the Matter of DONALD L. WILSON and MARGIE I. WILSON and WILSON SUGAR AND ELEVATOR COMPANY, INC., Bankrupt.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, John A. Potucek, Trustee of Wilson Sugar and Elevator Company, Inc., Bankrupt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on November 1, 1962 (Appendix C, p. A21). The judgment af-

firmed the ruling made by the United States District Court for the District of Kansas which in turn reversed the Referee of such Court before whom the matter was tried. Under such judgment the Respondents can reclaim property in the hands of the Trustee on the theory that Respondents did not realize they were doing business with the Petitioner but rather thought they were doing business with another.

The litigation arises out of the Bankruptcy Act, jurisdiction being founded on the Federal Constitution and the Federal law. The estate of the Bankrupt was being administered by a trustee duly appointed in the United States District Court for the District of Kansas.

OPINIONS BELOW.

The Referee's Findings of Fact, Conclusions of Law and Opinion (Appendix A) are not reported. The memorandum opinion of the United States District Court for the District of Kansas reversing the judgment of the Referee (Appendix B) is not reported. The opinion of the Court of Appeals affirming the District Court (Appendix C) is reported at ..... F.2d .....

JURISDICTION.

The judgment of the Court of Appeals was entered on November 1, 1962 (Certified Record from Clerk of Court of Appeals, pg. 4).* A Petition for Rehearing *En Banc* was filed on November 21, 1962 (R. 5). On November 30, 1962, the Court of Appeals denied the Petition for Rehearing *En Banc* and also denied on the same day the

*References in this section are all to such certified record.

Petition for Rehearing (R. 7). The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* 1254 (1).

QUESTIONS PRESENTED.

1. A question presented is whether a person aggrieved by the judgment of a Referee in Bankruptcy may have a petition for review heard and determined by the United States District Court when such petition for review is not filed within ten days from the date of the Referee's order or within an extension obtained by order on a motion itself filed within ten days of the Referee's order, all as provided in 11 *U.S.C.* 67 (c).

2. A further question involved concerns the application of *Rule 52 (a) of the Federal Rules of Civil Procedure*, 28 *U.S.C.*, and *General Order 47* (11 *U.S.C.* following Sec. 53), to petitions for review of orders of a Referee by the District Court and by the Court of Appeals on appeal. Such second question presented is whether the Court of Appeals, in overturning the Referee's Findings of Fact (after proceedings where the witnesses were heard and their testimony tested by the Referee against the documentary evidence) in the face of *Rule 52 (a)* and in the face of *General Order 47* misapplied such rule and order and sought to modify the plain provisions of such rule and order by application of another principle pursuant to which the Court of Appeals held that the Referee could not disbelieve witnesses heard only by the Referee.

CONSTITUTIONAL PROVISIONS, STATUTES, FEDERAL RULES OF CIVIL PROCEDURE AND GENERAL ORDERS INVOLVED.

Article I, Section 8, of the *Constitution* provides in pertinent part,

> "To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States."

Article III, *Section* 2 of the *Constitution* provides in pertinent part,

> "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *"

11 *U.S.C.* 67. (c) provides,

> "(c) A person aggrieved by an order of a referee may, within ten days after the entry thereof *or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow,* file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest." (Our emphasis.)

Rule 52 (a) provides,

> "Rule 52. Findings by the Court
>
> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

General Order 47 provides,

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

STATEMENT.

Three bankruptcy estates were consolidated by the Referee duly appointed and acting under the United States District Court for the District of Kansas (R. 3-4).* The Respondents, Mexican corporations and manufacturers of twine and twine products, had shipped quantities of twine to the Bankrupt, which twine was in the hands of the Trustee and which the Respondents by reclamation petitions sought to obtain. There are two Respondents, Cordeleria Lourdes and Cordeleria Santa Ines (hereinafter

*References herein are to the record printed for the court below.

referred to as "Lourdes" and "Ines"), but their situation in all respects pertinent herein is the same. Each had shipped a quantity of twine to the Bankrupt, a part of which was paid for and a part of which remained unpaid for at the time of bankruptcy, the portion unpaid being represented by time drafts which were accepted by the Bankrupt and which at the instance of the Bankrupt had been extended in far as the original time for payment was concerned.

Respondent Lourdes asserted in its reclamation petition that it had sent four invoices, the first of which and one-half of the fourth of which were paid, but the unpaid invoices aggregated $34,500.00. Respondent Ines asserted in its reclamation petition that it had shipped a quantity of twine with a sight draft of $20,150.00 attached (which sight draft was paid) and with a time draft in an equal amount—$20,150.00 which was unpaid. Both Respondents asserted that the twine they shipped was in the hands of the Trustee. Both Respondents asserted that under their rules and regulations (the rules and regulations of Cordeleros de Mexico, a Mexican trade association whose purpose was to police the twine industry and to fix and maintain prices), they could deal only with (and thought they were dealing with) Midcontinent Twine Co., Inc., of Plattsmouth, Nebraska, and it was only after bankruptcy that they ascertained that they were not dealing with Midcontinent Twine Co., Inc. (R. 4-6, 23-24).

The Trustee, Petitioner herein, answered, admitting that he had in his custody and control twine which was shipped by the Respondents, but denied any right in the Respondents to reclaim such twine. Petitioner asserted that the Respondents knew the Bankrupt, Wilson, with whom they dealt, and shipped the twine to Wilson under an arrangement whereby Wilson accepted time drafts so that Respondents meant to, and actually did, extend credit

to Wilson without any security such as a conditional sale, chattel mortgage, or otherwise (R. 35-38).

At the hearing many exhibits were received. It appeared therefrom that Midcontinent Twine Co., Inc., of Plattsmouth, Nebraska, entered into a contract with the Bankrupt, Wilson, under which all its rights to the brand name—Midcontinent—and all its rights as an importer of twine from Mexico were sold to the Bankrupt, Wilson (R. 87, 19-22).

The twine sent was on orders signed by the Bankrupt, Donald L. Wilson, and usually on stationery of his corporation, Wilson Sugar & Elevator Company, Inc. The twine was shipped with drafts attached and was invoiced. The drafts were to Donald L. Wilson, Wilson Sugar & Elevator Company or to Donald L. Wilson—Midcontinent Twine Company, with the invoices corresponding to the drafts. All the time drafts used were extended by the Respondents at the request of Donald L. Wilson (R. 26-33, 83-90, 115-128, 91-97, 159-163, 8-17, 135-157).

The parties stipulated before the Referee to correspondence with the American Consul to determine the Mexican law pertaining to twine to be shipped to the United States. The American Consul answered and advised that there are no Mexican laws governing imports into the United States since such matters come under the sovereignty of the United States Government, which through its bureau of customs, controls the inward flow of products. There are no quotas and no import duties on the importation of twine and therefore no import permits are required. The Consul further advised that on the Mexican side there is an export permit, that is, permission from the Mexican Government to ship products out of Mexico. These export permits apply to twine and are issued to

the Mexican Mills and are binding upon the Mills and not upon a buyer in the United States. Further advising, the Consul stated that there was a third instrument which affects the American buyer—in December of 1953 several mills in Mexico formed an association known as the Cordeleros de Mexico, the purpose of the organization being to establish standards of quality for twine and maintenance of uniform price schedules for twine, thus preventing cutthroat competition detrimental to the industry. The association inspects the products of the various mills, vouches for quality standards, registers all orders and recommends approval of orders to the representative of Industry and Commerce.

The association reviews all sales contracts proposed by the various mills and as the industry's representative exercises its right to sell to whom it pleases and either approves or disapproves the proposed contract. Approved buyers are registered with the organization and its member mills are not allowed to sign contracts with buyers who are not registered. Contracts are not transferable. The manufacturer of twine may not sign a contract with a buyer who is not registered, and may not ship twine without the approval of the association. This is a requirement of the association and not a Mexican law but Mexican law requires an export permit and the mill can not obtain an export permit without association approval. Without a contract approved by the association the seller could not obtain approval for a shipment and the buyer would not receive any twine and perhaps not a new contract. The courts enter the matter very rarely since no American buyer would bring suit in Mexico where the process could be endless and he would certainly lose; if he sued in the American courts, the judgment would not be binding upon the Mexican mill. The government per-

mits the association to have this power. If it did not exercise it, the government would probably step in, since it is interested in standard quality and uniform prices (R. 39, 41-45).

In addition to the considerable number of exhibits introduced and received, the Referee heard two witnesses, the managers of each of the two Respondents who were the Petitioners before the Referee. Both of such managers testified that they actually met Donald L. Wilson who came to Mexico in the company of Tritsch who had owned Midcontinent Twine Company, Inc., of Plattsmouth, Nebraska. Both reluctantly testified that they stamped on one side of the bales of twine "Made especially for Donald L. Wilson, Riverdale, Kansas" and on the other side, "Made especially for Midcontinent Twine Company, Riverdale, Kansas". Both managers also testified that they could export twine under the rules of their own association only with a registered exporter and the only registered exporter was Midcontinent Twine Company, Inc., of Plattsmouth, Nebraska. Both testified that they thought they were dealing with Midcontinent Twine Company, Inc., of Plattsmouth, Nebraska, even though the twine was sent to the bankrupt Wilson and the drafts were made to him or one of his companies (R. 79-102).

The Referee, on September 12, 1960, after considering the testimony heard by him and the various and sundry exhibits, rendered his decision (R. 45-52), (Appendix A). He concluded that the real legal question in issue was whether the Trustee had title to the twine or whether the Respondents had a lien on the twine shipped by them to the bankrupt. He determined that no procedure was used by the Respondents to retain any title or any security interest in the twine and that the Respondents did not sell the twine for cash but rather on open account

via time drafts. He therefore concluded that since the twine had been delivered, the time drafts attached had been accepted and the time of the payment thereof extended, that title was in the bankrupt and the reclamation petitions had to be denied (R. 49-52).

Both Respondents filed a petition for review. First, however, each of the Respondents, on September 22 and within 10 days of the Referee's order, filed a motion to extend the time for filing of petitions for review to October 12, 1960 (R. 52).

The United States District Court entered its order extending the time for filing petitions for review, the order being entered on the same date as the filing of the motion—September 22, 1960, and the extension running to October 12, 1960 (R. 54).

On October 12 both Respondents filed a second application for enlargement of time to file a petition for review and the Court on the same day, October 12, entered its order again extending the time for filing such petitions for review (R. 53-54).

Both Respondents filed a petition for review within such second extension (R. 59-60).

After reviewing the record and without hearing any additional testimony or receiving any additional exhibits, the United States District Court for the District of Kansas on October 23, 1961, entered its memorandum opinion reversing the Referee (Appendix B).

In that decision the District Court determined, based on *Nicholas* v. *Davis*, 204 F.2d 200, 10th Circuit (1953) that the Referee had to believe the managers of the Respondents when such managers testified that they did not realize that they were dealing with a different entity

than the registered importer for Mexican twine, the Mid-continent Twine Company, Inc., of Plattsmouth, Nebraska. Therefore the Court concluded that the Referee's finding was improper and since the Respondents had a right to pick with whom they dealt, they had a right to reclaim their merchandise (R. 62-71).

The Trustee timely filed a notice of appeal which was heard by the United States Court of Appeals, 10th Circuit. Such Court in its opinion filed November 1, 1962 (Appendix C) determined that the 1960 amendment to the *Bankruptcy Act*, 11 *U.S.C.* 67 (c) did not restrict the jurisdiction of the District Court to hear petitions for review, if the court so desired, even though the petition for review was not filed within 10 days of the Referee's order and even though the petition for review was not filed within the time as extended by the court on a motion itself filed within 10 days of the Referee's order. Such Appellate Court also determined that the clearly erroneous rule (*Rule* 52 (a) of the *Federal Rules of Civil Procedure* and *General Order* 47 of the *General Orders in Bankruptcy*) applied to the findings of the Referee. However, it further held that the District Court was correct in applying the rule of *Nicholas* v. *Davis*, 204 F.2d 200, 10th Circuit (1953); that the Referee had to believe the testimony of the two managers of the Respondents; and that pursuant to such rule the findings of the Referee were clearly erroneous and the judgment of the District Court must, therefore, be affirmed.

REASONS FOR GRANTING THE WRIT.

I.

The Court Below, in Construing 11 U.S.C. 67(c) Determined a Question of Federal Law Arising under the Bankruptcy Act (Which Has Not Been, But Should Be, Decided by This Court) in a Manner at Variance with the Plain Words of the Section and the Legislative History Thereof and in So Doing Came in Conflict, at Least in Principle, with a Decision of the Court of Appeals for the 7th Circuit.

The statute in issue (p. 4, *infra*) covers all review proceedings arising under the Bankruptcy Act. It is therefore of the utmost importance that such statute receive the same construction in our many Federal courts so that review in bankruptcy actions is uniform. The section has already caused our Federal courts a great deal of concern. Before its recent amendment in 1960, decisions dealing with such section from our various Federal courts were at odds in several particulars. This conflict was resolved by this Court in *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 87 L. Ed. 146 (1942). The section before its amendment in 1960 provided (see footnote 2 to this Court's decision in 317 U.S. at 145),

> "Section 39(c), 'A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing * * *'"

The conflict among the circuits was recognized as this Court stated, 317 U.S. at 145,

> • • • "A conflict of circuits as to whether the ten-day period for filing a petition for review of a commissioner's order was a limitation on the power of the reviewing court to act or on the right of an aggrieved party to appeal, impelled us to grant our writ."

This Court then in such decision reviewed the history of review proceedings beginning with the original *General Order in Bankruptcy XXVII* under which there was no time limit, the revocation of such order, and concluded, 317 U.S. 152,

> "Section 39(c) was intended to establish definitely and clearly the proceeding for review of a referee's order in the interest of certainty and uniformity but the legislative history reveals no intention to change the pre-existing rule as to power."

Therefore, this Court concluded, 317 U.S. 153,

> • • • "We do not think Section 39(c) was intended to be a limitation on the sound discretion of the bankruptcy court to permit the filing of petitions for review after the expiration of the period. The power in the bankruptcy court to review orders of the referee is unqualifiedly given in Section 2(10). The language quoted from Section 39(c) is rather a limitation on the 'person aggrieved' to file such a petition as a matter of right."

Thus, this Court, in construing the review section of the Bankruptcy Act, resolved the conflict in the circuits and made certain that uniformity would prevail.

Congress, however, was not satisfied with such construction. In 1960 it amended *Section* 39(c) of the *Bank-*

ruptcy Act (11 *U.S.C.* 67(c)). The statute as now amended is set forth herein at page 4. The legislative history of the new enactment is set forth in Appendix D as taken from 2 *U. S. Code, Congressional and Administrative News,* 86th Congress, Second Session, 1960, pp. 3194-3197. It clearly appears therefrom that the Congress meant to change review proceedings from the rule this Court determined in the *Pfister* case, *supra,* and to make it clear that there should be no uncertainty as to the finality of a referee's order under the doctrine that a District Court may entertain an untimely petition for review. The purpose of the enactment was quite obviously to fix a definite period of time within which an application for review had to be filed—otherwise the Referee's order would be final. The amendment was recommended by the administrative office of the United States courts. As set forth in its recommendation (Appendix D, p. A34):

> • • • "that unless the person aggrieved shall petition for review of such order within such 10-day period, or an extension thereof, the order of the referee shall become final." (p. 3195).

The explanation of the bill puts the matter concisely (Appendix D, p. A36):

> "Uncertainty as to the finality of a referee's order now exists because of the holdings of some courts that a bankruptcy court may entertain an untimely petition for review, even in the absence of an extension of time. In view of this an amendment to section 39c is needed that will fix a definite period of time within which an application for review must be filed. The bill would amend section 39c so as to make it clear that the petition for review must be filed within the prescribed 10-day period or within such extended time as the court may allow upon petition for extension filed within such 10-day period." (p. 3196).

The Respondents herein filed petitions for review but did not file their petitions within ten days and did not file their petitions within an extension itself granted on a motion filed within ten days of the referee's order. The referee's order, therefore, as contemplated by the Congress in its amendment, was final. The Court below, however, concluded that the new amendment did not limit the discretionary power of a district court to receive and grant a petition for review and relied for its determination on *Pfister* v. *Northern Illinois Finance Corp., supra.* In so determining, confusion concerning review of referee's orders settled by the *Pfister* case has been raised again and the determination of the Congress as to the time for finality of referee's orders has been frustrated.

The United States Court of Appeals for the 7th Circuit has considered the same statute, 11 *U.S.C.* 67(c) in *In re Acme Furnace Fitting Co.*, 302 F.2d 318 (1962) (cert. den. 9 L. Ed. 2d 88). The same situation presented to the court below was not involved, but the 7th Circuit was concerned with exactly the same statute and exactly the same question, *i. e.*, the finality of referee's orders. The 7th Circuit stated, 302 F.2d at 320,

> "The last italicized sentence shown above was added by the 1960 amendment. It makes clear that a petition for review must be filed within the prescribed ten day period or within such extended time as the court may allow upon a petition for such extension filed within the same ten day period."

Clearly, the decision of the 7th Circuit is, at the very least, in principle opposed to the determination made by the court below. Additionally there have been several district court decisions construing the new amendment to 11 *U.S.C.* 67(c). These decisions, set out in a footnote hereto, indicate clearly that such courts could no longer

find any inherent discretionary power in the district judge to grant a petition for review. The decisions succinctly state that "final" means "final", and if no petition for review is filed within ten days or within an extension obtained upon a motion itself filed within ten days of the referee's order, that such order is necessarily final.*

We submit it is imperative that this Court determine with finality this important question, arising under the Federal Bankruptcy Law to establish uniformity among our many Federal courts in this important area. The decision of the court below begins anew the conflict and confusion in review proceedings. Such question should be set at rest, which can only be done by this Court.

II.

There Is a Compelling Need for This Court to Clarify the Standards of Review Set Forth in Rule 52(a) and Its Counterpart in Bankruptcy Proceedings—General Order 47. The Required Standards of Appellate Review Should Be Stated to Make It Clear That a Departure Therefrom, As Attempted by the Court Below, Is Unauthorized and Unwarranted.

The court below in its opinion (Appendix C at p. A27) recognized the conflict in the Circuits in the application of the clearly erroneous rule to either the de-

*In re Watkins, 197 F. Supp. 500, W.D. Va. (1961); In re Lawson, 201 F. Supp. 710, W.D. Va. (1962); In re Middletown Packing Co., 199 F. Supp. 657, D. Conn. (1961); In re Silver, 199 F. Supp. 836, S.D. N.Y. (1961); In re Victor P. Danenza, 200 F. Supp. 694, E.D. N.Y. (1962); In re Harnik, 207 F. Supp. 325, W.D. Ark. (1962); and note in accord 2 Collier on Bankruptcy, 14th Ed., Sec. 39.01, p. 83, and 8 Remington on Bankruptcy, 1962 Supp., Pars. 3406 and 3407, pp. 34-35.

cision of the district court or the decision of the referee.* It determined correctly, we submit, that both the district court and the Court of Appeals must accept the fact findings of the referee unless they were clearly erroneous. *Rule 52(a)* and *General Order No. 47* set forth herein at page 5 amount to the same thing. Findings of the trier of the facts (in bankruptcy matters, the referee) must be accepted unless clearly erroneous.

The clearly erroneous rule has been defined for the guidance of the Courts of Appeals by this Court in *United States* v. *United States Gypsum Company*, 333 U.S. 364, 92 L. Ed. 746 (1948), this Court stating, at 395,

> • • • "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This Court recognized, along with such definition, that the evaluation of testimony was for the trier of the facts and that only where such testimony was in conflict with contemporaneous documents was an appellate court privileged to give it little weight. As this Court put it, at page 396,

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*Such conflict, as note *In the Matter of Herman Tabibian*, 289 F.2d 793, 2 Cir. (1961); *Phillips* v. *Baker*, 165 F.2d 578, 5 Cir. (1948); *In re Newman*, 126 F.2d 336, 6 Cir. (1942); *In re Skrentny*, 199 F.2d 488, 7 Cir. (1952); *Gross* v. *Fidelity & Deposit Company of Maryland*, 302 F.2d 338, 8 Cir. (1962); *Lines* v. *Falstaff Brewing Co.*, 233 F.2d 927, 9 Cir. (1956), cert. den. 352 U.S. 893, 1 L. Ed. 2d 88; *Forbush Co.* v. *Bartley*, 78 F.2d 805, 10 Cir. (1935); *In the Matter of the Arbycraft Co.*, 288 F.2d 553, 3 Cir. (1961); *Mountain Trust Bank* v. *Shifflett*, 255 F.2d 718, 4 Cir. (1958); *Stewart* v. *Ganey*, 116 F.2d 1010, 5 Cir. (1941); *Carr* v. *Southern Pac. Co.*, 128 F.2d 764, 9 Cir. (1942); has not been, but should be, resolved by this Court.

> "Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we can not under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."*

The court below added a standard to the clearly erroneous rule provided for by *Rule 52(a)* of the *Federal Rules of Civil Procedure* and *General Order No. 47 in Bankruptcy*. Thus in its opinion (Appendix C, p. A28) it called attention to the evidence of the two managers of the Respondents who testified and determined therefrom that the principles pronounced in *Nicholas* v. *Davis*, 204 F.2d 200, 10th Circuit (1953), were applicable. The principle thus used was set forth in *Nicholas* v. *Davis*, at page 202,

> "When controlling, positive, and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper, and no circumstance reflected on the record casts doubt on its verity, then under the principles laid down in Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 215-220, 51 S. Ct. 453, 75 L. Ed. 983, it may not be disregarded, even though adduced from interested witnesses, and no question of credibility or issue of fact is presented for determination by the jury."

Such principle so enunciated and applied to modify the clearly erroneous rule by the court below was bor-

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*For other decisions of this Court involving and defining the clearly erroneous rule, see *McAllister* v. *United States*, 348 U.S. 19, 99 L. Ed. 20 (1954); and *Commissioner* v. *Duberstein*, 363 U.S. 278, 4 L. Ed. 2d 1218 (1960).

rowed from this Court's determination in *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U.S. 209, 75 L. Ed. 983 (1931), which decision, of course, came long before the adoption of the Federal Rules of Civil Procedure and thus long before the creation of the clearly erroneous rule. It can therefore have no application in the present proceedings and should not be relied upon to modify the clearly erroneous rule as set forth and construed by this Court since the adoption of the Federal Rules of Civil Procedure.

The importance of the credibility rule necessarily involved in applying "clearly erroneous" can not be overstated. Due regard must be had for the trier of the facts who alone saw the witnesses, heard the testimony, and therefore could weigh it as compared with the documentary evidence. This Court in a decision in an entirely different area has very recently recognized the necessity of leaving credibility with the trier of the facts, noting that the trier may believe or disbelieve the testimony of a witness and determine that such testimony is true or that the opposite constitutes the true state of affairs. Thus in *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 7 L. Ed. 2d 829 (1962), at 832, this Court observed,

> * * * "As we said in the Universal Camera Case: '* * * The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.' 340 U.S. at 496.
>
> "For the demeanor of a witness * * * 'may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that

he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.' Dyer v. Mac Dougall, (C.A. 2, N.Y.) 201 F.2d 265, 269."

We submit that the Court of Appeals for the 2nd Circuit has correctly stated the principles applicable in bankruptcy proceedings, while recognizing the importance of the trial court's determination of the credibility of witnesses. Thus in *Simon* v. *Agar*, 299 F.2d 853 (1962), such court in a *per curiam* opinion observed,

> "It is too well settled to require the citation of authorities that where an appeal brings up for review concurrent findings of fact by the referee and the district court, they can be set aside only if 'clearly erroneous'. See Bankruptcy General Order 47, 11 U.S.C.A. following section 53; Rule 52(a) F.R.Civ.P., 28 U.S.C.A. Particularly is this true where, as in this case, the findings involve questions of credibility of witnesses who testified before the referee."

The court below did not follow these principles. It sought to modify the clearly erroneous rule by application of a principle enunciated long before the adoption of the Federal Rules of Civil Procedure. In so doing it deviated from the standards laid down by this Court.

The evil in attempting so to tack on to the clearly erroneous rule is apparent upon even a cursory review of the facts involved in these proceedings. The question here before the referee in the first instance concerned whether the petitioning Mexican corporations, the Respondents, intended to extend credit to the bankrupt Donald L. Wilson or his companies. To determine this matter the referee received in evidence a quantity of exhibits and heard the testimony of the managers of the two Mexican corporations. Both testified that they had no idea that

they were dealing with Donald L. Wilson but, on the contrary, thought that they were dealing with Midcontinent Twine Company, Inc., of Plattsmouth, Nebraska, which company alone had the export permit required by their trade association. The referee obviously did not believe this testimony but, on the contrary, believed its opposite. The trier of the facts was so led to believe the opposite, doubtlessly by contemporaneous writings as well as from the demeanor and manner of testifying by the witnesses. Thus in one of the contemporaneous writings (R. 163) one of the Mexican corporations wrote to the bankrupt's bank (the First National Bank in Wellington, Kansas) stating,

> "Offers Donald L. Wilson 30 days to pay for the Baler and Binder Twine shipments that we make him during the 1959-1960 twine season providing that we can *descount* the acceptance papers accepted by him and endorsed by us in a Bank of Kansas, for which we would open an account in said Bank and leave a constant balance of 5,000 Dls. or a little more in it.
>
> "We would send original Bill of lading and insurance papers to Mr. Wilson's Brokers in Houston and copies to Mr. Wilson together with the draft already endorsed, same draft that he would take it to the bank after accepting it, and the bank would take his interest, discount it, and put it in our account.
>
> Cordeleria Santa Ines, S.A, Tomis Martin."

Thereafter the twine was shipped by the Mexican corporations with sight drafts and time drafts attached, the sight drafts being obviously paid and the time drafts being accepted. The time of payment for such time drafts was extended—accomplished by a series of contemporaneous telegrams. The first (R. 127) was from Wilson

to the manager of the Mexican corporation Cordeleria Santa Ines,

> "Due to bad weather unable to move twine please give me 30 days extension on draft which is due 4-6-60. I will pay the interest. Please notify Whitney National Bank, New Orleans and tell them to notify my Bank First National Bank Wellington, Kans.
>
> Donald L. Wilson, Riverdale, Kans."

Such extension was granted, as note the next in a series of telegrams,

> "Donald L. Wilson, P.O. Box 36, Riverdale, Kansas. U.S.A.
>
> "Bank only accepts 15 day *extention* on new draft. Imperative that it is paid by April 21st. Thanks. (R. 127).
>
> Santines."

A second extension was also obtained by a telegram sent by Donald L. Wilson,

> "Cordeleria Answer Requested Attn Alfonso Martin Santa Ines S A
>
> Must request another 15 day extension on draft which is due 4-21-60. Twine is just now beginning to move. I heard you were in New York if so please come *dy* Please notify banks.
>
> Donald L. Wilson, Riverdale, Kansas." (R. 127-128).

The extension was granted, the Mexican corporation writing Wilson, stating,

> "Dear Mr. Wilson:
>
> We received yesterday a wire from your office advising that 15 days more were necessary to pick up the pending draft issued by us on your account, and immediately we got in touch with the Bank and secured the extension so you should be hearing from

them in that regards. Probably they will want to change the draft for a new one directly with you so as to keep it in date.

"All reports that we have been hearing the last two weeks are that the snow and ice is already melting and prospects are unusually good for a fine twine season. (R. 128).

Cordeleria Santa Ines S. A."

Exactly the same situation prevailed as to the other Mexican corporation. Thus before any credit was extended it received a letter from the Midcontinent Twine Company, Inc., of Plattsmouth, Nebraska (R. 140), stating,

"My Dear Friend Eduardo:

With reference to paragraph two of your letter I am very happy to note that you will ship Mr. Wilson 4,000 bales of Midcontinent on the boat February 19th—

Maynard Tritsch
Midcontinent Twine Company,
Plattsmouth, Nebraska."

Shipments of twine were made with time drafts attached, which were accepted. Wilson asked for an extension by telegram, as note (R. 157),

"Cord. Lourdes. SA. Atencion Eduardo Casares Jr.

Due to bad weather unable to move twine. Please give me 30 days extension after due date on drafts that will come due 4-11-60 and 4-19-60. I will pay interest, please notify Whitney National Bank at New Orleans and ask them to notify my bank First National Bank Wellington, Kansas.

Donald L. Wilson, Riverdale, Kansas."

This extension was granted as note a return telegram to Wilson (R. 157),.

"Retel stop Today we made 30 days extension on your drafts that will come due 4-11-60 and 19-4-60

we already instruct our bank and they will notify *Withney* National Bank and your Bank in Wellington Kans Letter Follows. Thank you.

Cordeleria Lourdes S. A."

We submit that even a casual examination of the contemporaneous writings indicates clearly why the referee believed the opposite of the testimony of the two managers of the Mexican corporations. Quite obviously they did extend credit to the bankrupt, did accept his drafts and did, at his request, extend the time of payment for such drafts. This is an illustration of how easily the rules of appellate review and the standards set forth by this Court to be used in applying the clearly erroneous rule can be lost when the creation of some other principle is attempted. We submit that the principle of *Nicholas* v. *Davis, supra*, can have no application to *Rule* 52(a) and *General Order 47 in Bankruptcy* and that even if such principle were appropriate in any case, it can have no application to the instant proceedings where the contemporaneous writings clearly show that the testimony of the witnesses is not trustworthy. This Court should ciarify the clearly erroneous rule as it applies in bankruptcy proceedings so as to obtain uniformity throughout these United States. In so doing it should point out that the Courts of Appeals can not graft new standards onto the clearly erroneous rule.

CONCLUSION.

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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